FILED

DEC 23 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK J. CLAYTON,

Petitioner - Appellant,

v.

MITCH MORROW, Superintendent,

Respondent - Appellee.

No. 02-36077

D.C. No. CV-00-01273-ALA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted October 10, 2003
Seattle, Washington

Before: TROTT, FISHER, and GOULD, Circuit Judges.

Mark J. Clayton appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. The state court's post-conviction determination that

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Clayton failed to prove ineffective assistance of counsel was not objectively unreasonable, and therefore we affirm.

Discussion

> As the Supreme Court reminded us in Yarborough v. Gentry,
>
> > [i]f a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable.
>
> Yarborough, 124 S. Ct. 1, 4 (2003) (citing Wiggins v. Smith, 123 S. Ct. 2527, 2534-35, (2003); Woodford v. Viscotti, 537 U.S. 19, 24-25 (2002); Williams v. Taylor, 529 U.S. 362, 409 (2000)).

The state court concluded that Clayton's allegations that his counsel misled him as to the law are not true. This determination is amply supported by the record. Although defense counsel's letter may have been somewhat ambiguous, it contained no clear misstatement of the law. It was not at all objectively unreasonable to regard defense counsel's representation in the seventh paragraph, that consent is no defense, as referring to the second degree sexual abuse charge. Under Oregon law, it is an entirely accurate statement that consent is no defense to this charge. Counsel did not say, in this disputed letter or elsewhere, that consent

was not a defense to the other charges involving Measure 11. Therefore, looking at the record as a whole, it was not objectively unreasonable for the state court to conclude that Clayton's defense counsel committed no errors.

AFFIRMED.